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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

**Commodity Futures Trading
Commission**

Plaintiff,

vs.

**Equity Financial Group LLC,
Tech Traders, Inc.,
Vincent J. Firth, and
Robert W. Shimer,**

Defendants.

Document Electronically Filed

CIVIL ACTION NO. 04-cv-1512 (RBK-AMD)

RESPONSE TO LEGAL ISSUES RAISED BY
THE EQUITY RECEIVER'S OBJECTIONS TO CLAIMS

Sterling ACS Ltd., Sterling Alliance Ltd., Sterling Casualty & Insurance Ltd., Sterling Bank Limited, Sterling (Anguilla) Trust Ltd., Sterling Investment Management Ltd and Strategic Investment Portfolio LLC (collectively, the "Sterling Entities"), through their undersigned counsel, submit this response to the legal issues raised by the Equity Receiver's objections to their claims.

The Sterling Entities incorporate by reference as if set forth herein the legal arguments set forth in their Memorandum of Law in Opposition to Motion Of Equity Receiver for Authority to Make Interim Distribution on Account of Investor Claims, dated February 11, 2005 and their Memorandum of Law and Fact in Response to the Objection Filed By the

CFTC, dated April 22, 2005. For the sake of judicial economy, the Sterling Entities will not duplicate those arguments in this submission.

I. Aggregation of the Sterling Entities Claims

Each of the Receiver's arguments for the proposition that aggregation is equitable in the case of the Sterling Entities lack merit.

The Receiver argues that the accounts should be aggregated because they are under common control. While this argument might be applicable if the funds belonged to the Sterling entities, it falls apart when one considers the undisputed fact that more than ninety percent (90%) of the funds belong to clients of the respective Sterling Entities. This is not a situation in which you have five accounts belonging to one person aggregated to net the deposits and withdrawals (i.e., multiple accounts owned by a single investor); rather, the funds belong to many "depositors" with different interests. The inequity is best demonstrated by the comparison of Sterling Bank to Sterling Trust (Anguilla). There is no dispute that more than \$9 million dollars of the \$9.177 million recognized by the Receiver was deposited by one client which made no withdrawals. In contrast, the Receiver has suggested that Sterling Trust – which is comprised pf funds belonging to different clients – deposited no money and made a net withdrawal of \$100,000. Applying the Receiver's aggregation theory (assuming that we are dealing only with these two entities) would shift the burden of the entire \$100,000 withdrawal to the one Sterling Bank client which did not withdraw funds. That result is inequitable. In effect, it penalizes the client of one Sterling entity for withdrawal made by distinct clients of a separate Sterling entity which provides different services. Common control of the entities is irrelevant to this analysis.

The Receiver's argument with respect to "inter-entity" transfers similarly is a red herring and wholly irrelevant. A cursory comparison of the claim forms submitted by the Sterling Entities to the claim amounts listed by the Receiver in his objection reveals that he intentionally excluded inter-entity transfers at Tech Traders from his calculations. In other words, the claims recognized by the Receiver do not consider inter-entity transfers and simply reflect the total money deposited with Tech Traders by each Sterling Entity. The best example of this course of conduct is claim number 75 for Sterling Trust. In his objection, the Receiver asserts that the claim amount – or as he calls it, "Funds Invested (per claim form)" – for Sterling Trust is \$0, despite the fact that the claim form (¶ 6) reflects an internal transfer at Tech Traders of \$250,000 on December 31, 2002. Since the inter-entity transfer's were not recognized by the Receiver and documentation of the funds invested by each Sterling entity has been provided, the so called inter-entity transfers are irrelevant.

The Receiver also argues that it would be inequitable to other claimants not to aggregate the accounts because Sterling Trust had a net withdrawal of \$100,000. That argument lacks merit. Shifting the burden of the \$100,000 withdrawal to all claimants is far more equitable than foisting it upon the Sterling entities. If the entire pool of claimants were to absorb the withdrawal, each claimant – including each Sterling Entity – would have to absorb only a small portion of the shortfall. This is no different than the burden they are sharing with respect to the other \$26,000,000 which is no longer available because it was lost or distributed to others. Moreover, the suggestion that the \$100,000 withdrawal cannot be recovered from Sterling Trust is disingenuous. When the CFTC decides to properly conduct itself in this matter, we expect that it will name relief defendants and seize funds in an attempt

to recover more than \$18 million of the shortfall which was distributed to others. It is within the CFTC's power to name Sterling Trust as part of that action – and \$2 million of Sterling Trust's funds already improperly are frozen.¹

Finally, the Receiver's suggestion that the effects of aggregation could be worked out among the Sterling Entities is short sighted. The Receiver admits that the aggregation would cause the Sterling Entities interim distribution to be reduced by \$342,000 (and that is only on the interim distribution). Consequently, there is nothing to be resolved among the entities. They will all receive less money as a result of this treatment. It is not the case that one entity will receive more than another and it could transfer the funds to be equitable. The aggregation of the Sterling Entities claims simply is inequitable.

For all of these reasons and those set forth in the Sterling Entities' Memorandum of Law in Opposition to Motion Of Equity Receiver for Authority to Make Interim Distribution on Account of Investor Claims, dated February 11, 2005, this Court should not permit the Receiver to aggregate the claims.

II. Beneficial Interests

The Receiver has taken the position that the Sterling Entities must disclose natural persons with a beneficial interest in the accounts at Tech Traders even where there is none. Consequently, he is deeming the claim form disclosure and the additional disclosure of the

¹Notably, the Receiver cites no case law for the proposition that he can continue to hold the funds in the Man Financial account and those funds should be released. To the extent that the Court is concerned about the \$100,000 withdrawal from Tech Traders, simultaneous with the release of the Man Financial account Sterling Trust would post a bond in that amount with the Court.

Sterling Entities as deficient in all cases where a natural person was not disclosed as having a beneficial interest.² The August order provides, in pertinent part, as follows:

... investors must identify to the Receiver the nature and the extent of their interest in the receivership assets, as well as the identity of all persons having a beneficial interest of any kind in their account with the Defendants.

Order dated August 23, 2004 (emphasis added). Sterling has complied with the order by disclosing the “persons” who have any beneficial interest “in their account”. Extending the Order to include “natural persons” who have an interest in the entity (i.e., “person”) that holds a beneficial interest in the account is not only contrary to the plain language of the order, but also at odds with the law. The law is clear that an entity has legal existence separate and distinct from its owners. See, e.g., Dole Food Company c. Patrickson, 538 U.S. 468, 474, 123 S.Ct. 1655, 1660 (2003) (“... the corporation and its shareholders are distinct entities.”). The shareholders of an entity do not own it’s assets. Id.; Klien v. Bd. Of Tax Sup’rs of Jefferson County, 282 U.S. 19, 24, 51 S.Ct. 15, 16 (1930)(“The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.”). Thus, the owners of an entity that has a commodities account do not have an interest in the commodities account; rather, they have an interest in the entity. Since the Order specifically addresses persons with a beneficial interest “in the account”, this is yet another reason why the Receiver’s (and the CFTC’s) interpretation should be rejected.

² As discussed in the Sterling Entities’ Memorandum of Law and Fact in Response to the Objection Filed By the CFTC, dated April 22, 2005, the Court’s order refers to persons, and the entities identified by the Sterling Entities are “persons” under the Commodities Exchange Act.

CONCLUSION

Based upon the foregoing, the issues raised in the Sterling Entities' objection to the interim distribution and their responses to the CFTC's objections, the legal arguments raised in support of the Receiver's objections should be overruled and funds should be distributed to the Sterling Entities on an individual basis.

Dated: May 6, 2005

Respectfully submitted,

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